No. 83-812

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1983

GEORGE C. WALLACE, ET AL., APPELLANTS

v.

ISHMAEL JAFFREE, ET AL.

ON APPEAL FROM THE UNITED STATES COURT
OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF FOR WINSTON C. ANDERSON, ET AL AS AMICUS CURIAE IN SUPPORT OF REVERSAL

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QUESTION PRESENTED

Whether a state statute, which authorizes public school teachers to allow a brief moment of silence at the beginning of the school day for the purpose of "prayer or meditation," is invalid under the Establishment Clause or the Free Exercise Clause of the First Amendment of the United States Constitution as applied to the States through the Fourteenth Amendment.

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INTEREST OF WINSTON D. ANDERSON, ET AL

This brief is being filed by the consent of the parties, copies of said consents are filed herewith.

The case of Lloyd Gaines, et al v. Winston D. Anderson, et al, 421 F. Supp. 337, the Court upheld the moment of silence in the public schools to enable students to engage in silent voluntary prayer or meditation. The Court below held this practice unconstitutional under

the First Amendment of the United States Constitution, as applied to the states through the Fourteenth Amendment.

The Defendants have a substantial interest in this matter, which deals with the same question presented in both case.

STATEMENT

1. Appellee Ishmael Jaffree, an agnostic, filed this suit on behalf of three of his children who attend Mobile County, Alabama Public Schools, challenging certain teachers' practice of conducting prayers with students during school hours. Jaffree v. Board of School Commissioners, 554 F. Supp. 1104 (S.D. Ala. 1983) (J.S. App. 1d-55d). After the suit was filed but before it was decided by the district court, the state legislature enacted Senate Bill 8, 1982 Ala. Acts 82-735, codified at Ala. Code §16-1-20.2 (Cum. Supp. 1982), permitting public school

teachers and professors to lead willing students in recitation of a state-composed prayer at the beginning of any homeroom or class period.[1] Appellee amended his complaint to challenge the

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[1] As enacted, Ala. Code §16-1-20.2 (cum. Supp. 1982) provides that:

> From henceforth, any teacher or professor in any public education institution within the State of Alabama, recognizing that the Lord God is one, at the beginning of any homeroom or any class, may pray, may lead willing students in prayer, or may lead the willing students in the following prayer to God:
>
> Almighty God, You alone are our God. We acknowledge You as the Creator and Supreme Judge of the world. May your justice, Your truth, and Your peace abound this day in the hearts of our countrymen, in the counsels of our government, in the sanctity of our homes and in the classrooms of our schools in the name of our Lord. Amen.

constitutionality of this statute and a previously-enacted provision, Ala. Code §16-1-20.1 (Cum. Supp. 1982), which authorizes teachers to permit a minute of silence for meditation or voluntary prayer at the commencement of the first class period.[2] Appellee joined as defendants the Governor of Alabama, the state Attorney General, and several state education officials. Jaffree v. James, 544 F. Supp. 727 (S. D. Ala. 1982) (J.S. App. 56d-61d).

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[2]Ala. Code §16-1-20.1 (Cum. Supp. 1982) provides that:

> At the commencement of the first class of each day in all grades in all public schools, the teacher in charge of the room in which each such class is held may announce that a period of silence not to exceed one minute in duration shall be observed for meditation or voluntary prayer, and during any such period no other activities shall be engaged in.

The district court severed appellee's claim challenging teacher-initiated prayer from his claim challenging the state statutes. Based on the court's view that "the establishment clause of the first amendment to the United States Constitution does not bar the states from establishing a religion" (J.S. App. 59d), it dismissed the challenge both to teacher-initiated prayers (Jaffree v. Board of School Commissioners, supra) for failure to state a claim upon which relief could be granted (J.S. App. 53d, 59d). Justice Powell, as Circuit Justice, issued an order granting a stay of the district court's order and reinstating the injunction pending final disposition of the appeal (J.S. App. 2e-5e).

2. The court of appeals reversed the dismissal of both of the appellee's claims and remanded the case for entry

of an order enjoining the implementation of the statutes and teacher-initiated prayers. Jaffree v. Wallace, 705 F. 2d 1562 (11th Cir. 1983) (J.S. App. 1a-20a). The court concluded (J.S. App. 7a-12a) that the district court's interpretation of the First Amendment is contrary to cases decided by this Court, including Everson v. Board of Education, 330 U.S. 1 (1947); Illinois ex rel. McCollum v. Board of Education, 333 U.S. 203 (1948); Abington School District v. Schempp, 374 U.S. 203 (1963); and Engel v. Vitale, 370 U.S. 421, 429-430 (1962)[3]. In one paragraph of its

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[3]Because the district court viewed the Establishment Clause as not applicable to the states (J.S. App. 59d), it did not make factual findings concerning the purpose or consequences of the statutes in question, nor did it separately analyze the statutes. The court of appeals rejected the district court's interpretation of the reach of the Establishment Clause (J.S. App. 10a-11a), but did not remand for separate consideration and factual findings on the moment of silence issue. Instead, it held the moment of silence statute facially invalid. (id. at 18a).

20-page opinion (J.S. App. 18a), the court of appeals held the moment of silence statute unconstitutional because its objective was "the advancement of religion."[4] The court states: "We do not imply that simple meditation or silence is barred from the public schools; we hold that the state cannot participate in the advancement of religious activities through any guise, including teacher-led meditation. It is not the activity

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[4]The court based this conclusion (J.S. App. 18a) on a preliminary finding by the district court on a motion for a preliminary injunction. The district court, in turn, relied solely on testimony by a legislator "that his purpose in sponsoring §16-1-20.1 was to return voluntary prayer to the public schools. He intended to provide children the opportunity of sharing in their (sic) spiritual heritage of Alabama and of the country." J.S. App. 71d. The district court reached no such finding in connection with its final judgment.

itself that concerns us; it is the purpose of the activity." J.S. App. 18a.

The court of appeals denied a petition for rehearing and rehearing en banc (J.S. App. 1b-2b). Four judges dissented from the denial of reconsideration en banc insofar as the decision invalidated Alabama's moment of silence statute (id. at 2b-4b). The dissenting judges observed first that the significance of the decision "transcends one state and one statute," because many other states have enacted similar laws (id. at 2b-3b). Second, the dissenting judges noted that the constitutionality of observing moments of silence in the public schools has not been resolved by this Court, and that other courts have reached conflicting decisions (id. at 3b). Finally, the dissenting judges expressed "some doubt as to the

correctness of the panel opinion" (ibid.), citing extensive scholarly and judicial authority in support of the constitutionality of moment of silence provisions (id. at 3b-4b). The judges concluded that "(h)owever the en banc court might resolve the issue, it is important and sufficiently unsettled to command its attention" (id. at 4b).

DISCUSSION

In the case of Linda Gaines et al v. Winston D. Anderson et al, in question was the constitutionality of the Massachusetts General Laws, Chapter 71, Section 1A, as amended by St. 1973, c. 621, which provides:

> At the commencement of the first class of each day in all grades in all public schools the teacher in charge of the room in which each such class is held shall announce that a period of silence

not to exceed one minute in duration shall be observed for meditation or prayer, and during any such period silence shall be maintained and no activities engaged in.

On January 12, 1976, the Defendants voted to implement M.G.L.A. c. 71 §1A. On January 27, 1976, the Defendants voted to adopt guidelines for local implementation.

The Plaintiffs in the Gaines case were students in the Framingham School System and their parents who sought a declaratory judgment to have the statute declared unconstitutional and to obtain a permanent injunction to prevent the Framingham School Committee from continuing in the implementation of M.G.L.A. c. 71, §1A.

See, Statement of Undisputed Facts annexed hereto as an appendix.

The most recent judicial statement in the area of separation of church

and state is set forth in Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756 (1973), where the Supreme Court held that a state statute, alleged to be unconstitutional under the "Establishment Clause" as it is incorporated into the Fourteenth Amendment, must satisfy three tests:

(a) The statute must reflect a clearly secular legislative purpose;

(b) The statute must have a primary effect that neither advances nor inhibits religion;

(c) The statute must avoid excessive entanglement with religion.

A. The Massachusetts Legislature in enacting the statute had a clearly secular legislative purpose. The statute in question was enacted in 1966. There is no evidence that the Legislature

intended the statute to fill the void left as a result of any previous statute, M.G.L.A. c. 71, §31 being declared unconstitutional. In determining constitutionality, there is a presumption that the intent of the Legislature was proper and that there was no attempt to override constitutional rights by indirection, Dudley v. Community Public Service, 108 F. 2d 119 (1930). The intent was to allow the students to calm down and attain a mental attitude conducive to learning, to enhance the authority of the teacher, inspire better discipline, and to create order, all of which are secular purposes. The use of the word "meditation" in the 1966 statute was intended by the Legislature as a guide to the students to demonstrate that the enforced silence should be used for serious, as opposed

to frivolous, reflection. In addition, the word "meditation" was chosen as it did not specifically connote religious contemplation and was an attempt at remaining non-religious. By definition, generally speaking, meditation was in 1966 and still is understood to refer to non-religious reflection or contemplation. Although the word "meditation" does not rule out religious reflection or contemplation, it does not generally require it.

The definition of meditation in Webster's New International Dictionary, unabridged, 1963 Third edition, is:

> 1. A spoken or written discourse treated in a contemplative manner and intended to express its author's reflections, or, especially when religious, to guide others in contemplation;
>
> 2. A private devotion or spiritual exercise consisting in deep, continued reflection on a religious theme;

3. The act of meditating, study or close reflections and continued application of the mind.

According to the "Preface" of Webster's New International Dictionary, the order of definitions follows the practice of listing the earliest ascertainable meaning first and later meanings are arranged in order shown to be most probable dated citations and semantic development. The third definition is, therefore, the most recent and most commonly used as of 1983. The word is seldom used in its religious sense. Language changes constantly and correctness rests upon usage. The English language is a living language and definitions are determined by what the people generally mean by the words they speak. Presently, the popular definition of "meditation" is the "act of meditating, study or close reflections

and continued application of the mind," and further reference to the definition of "meditate" or "meditating" is:

1. To ponder or to reflect on: muse over: consider or contemplate;

2. To plan or project in the mind: to design in thought: to intend, propose.

The American Heritage Dictionary of the English Language, published in 1971, defines meditation as follows:

1a. The act of meditating; b. a devotional exercise of contemplation;

2. A contemplative discourse, usually on a religious or philosophical subject.

As the first definition listed refers to the "act of meditating," reference is made to the definition of "meditating" in the same dictionary, which definition is as follows:

1. To reflect upon; ponder; contemplate;

2. To plan or intend in the mind; to engage in contemplation.

The American Heritage Dictionary is a modern approach to definition in the United States. The order of definition is a novel approach and in the "Guide to the Dictionary" it provides, in "Order of Definitions," that the first definition is the "central meaning about which the other senses may be most logically organized, and when an entry has multiple-numbered definitions, they are ordered "by a method of synchronic semantic analysis intended to serve the convenience of the general user of the Dictionary." The word's central meaning is synonymous with its most common meaning.

The only judicial interpretation of the statute as it was in 1966 appears

in the case of Rita F. Warren v. Joseph E. Killory, et al, Civil No. 73-1823-T (D. Mass., opinion and order February 4, 1975) where Judge Tauro in considering a student's claim to utter oral prayers in the classroom as a constitutional right under the "Free Exercise Clause," ruled that such a right is not mandated by the "Free Exercise Clause." Judge Tauro recognized the opportunity for prayer under the statute. He said:

> The present practice of the Brockton school system--allowing a minute of silent meditation before the commencement of the school day--is consistent with the independent co-existence mandated by the First Amendment with respect to church and state.

The United States Court of Appeals affirmed the decision on June 17, 1975, 516 F. 2d 894, affirmed without published opinion June 17, 1975.

In the case of School District of Abington Township v. Schempp, 374 U.S. 203, (1963), Justice Brennan in the concurring opinion said:

> It has not been shown that readings from the speeches and messages of great Americans, for example, or from the documents of our heritage of liberty, daily recitation or the Pledge of Allegiance, or even the observance of a moment of reverent silence at the opening of class, (ital. mine) may not adequately serve the solely secular purposes of the devotional activities without jeopardizing either the religious liberties of any members of the community or the proper degree of separation between spheres of religion and government. 374 U.S. at 281.

The 1983 amendment to the Massachusetts statute merely added the words, "or prayer," after meditation. The intent was to endeavor to maintain a position of neutrality in the matter of religion. The amendment was prompted by the result of a referendum on the 1972 Massachusetts

State ballot. The question on the state ballot was:

> Shall the voluntary recitation of prayer be authorized in the public schools of the Commonwealth?

The results were overwhelmingly in favor, with 84% of those responding favoring oral prayer in the schools. This showed general dissatisfaction with the existing state of affairs. Taking this into consideration, and recognizing the constitutional limitations, the present amendment was enacted as an attempt to satisfy the voter demand and to add further guidance to the statute to make it clear that it would be permissible for a student to use the moment of silence to either meditate or pray. The use of the words "or prayer" was intended by the legislators to balance the scales with "meditation" satisfying the non-religious and the words "or prayer,"

satisfying the religious. The end result was to maintain the delicate balance of neutrality required by the "Establishment Clause."

In Epperson v. Arkansas, 393 U.S. 97, 103 (1968), the Court in defining the doctrine of neutrality said:

> Government in our democracy, state and national, must be neutral in matters of religious theory, doctrine, and practice. It may not be hostile to any religion or to the advocacy of no-religion; and it may not aid, foster, or promote one religion or religious theory against another or even against the militant opposite. The First Amendment mandates governmental neutrality between religion and religion, and between religion and nonreligion.

Justice Clark speaking for the majority in Abington v. Schempp, 374 U.S. 225, said:

> We agree of course that the State may not establish 'a religion of secularism' in the showing hostility to religion, thus 'preferring those who believe in no religion over those who do believe.'

It is submitted that the Plaintiffs' position in the Gaines case of total eradication of all reference to religion is not a position of governmental neutrality; rather, it accomplishes the maintenance of a sterile atmosphere absolutely devoid of any religious reference and serves to establish a "religion of secularism."

Religion is deeply imbedded in the national character of the American people. Justice Goldberg, in his concurring opinion in Abington v. Schempp, 374 U.S. 306, said:

> Neither government nor this Court can or should ignore the significance of the fact that a vast portion of our people believe in and worship God and that many of our legal, political, and personal values derive historically from religious teachings. Government must inevitably take cognizance of the existence of religion and, indeed, under certain circumstances the First Amendment may require that it do so.

Areas of our government other than

education easily accommodate a closer relationship between religion and the state. Examples of such relationship are the use of invocational prayers in our legislatures, state and federal, and the appointment of legislative chaplains. Such a relationship is commonly justified by the fact that:

> Legislators, federal and state, are mature adults who may presumably absent themselves from such public and ceremonial exercises without incurring any penalty, direct or indirect. Abington v. Schempp, 374 U.S. 299

Recognizing that we are dealing with impressionable children whose presence in school is compelled, it is submitted that the Massachusetts statute here in question adequately safeguards the children in that prayer is but one of the many possibilities available and results in no direct or indirect coercion. It is submitted

that the statute in question imposes no threat to religious liberty. As Justice Goldberg said in his concurring opinion in Abington v. Schempp, 374 U.S. 308:

> The First Amendment does not prohibit practices which by any realistic measure create none of the dangers which it is designed to prevent and which do not so directly or substantially involve the state in religious exercises or in the favoring of religion as to have meaningful and practical impact. It is of course true that great consequences can grow from small beginnings, but the measure of constitutional adjudication is the ability and willingness to distinguish between real threat and mere shadow.

The facts in the Gaines case deal with a statute which requires only silence. This case is to be distinguished by its facts from Schempp in that the statute there found unconstitutional required, without comment, the reading of verses from

the Bible and recitation of the Lord's Prayer by the students in unison. Massachusetts General Laws, Chapter 71, Section 1A, does not require religious activity, does not influence the students' freedom of choice, does not coerce a student by way of anticipated pressure by his peers, and does not result in a student's urge to conform. The student may engage in meditation, may pray or merely may remain silent, which may suit those who prefer to think of other matters or of nothing at all. In Abington v. Schempp, 374 U.S. 203, 281, Justice Brennan concurring said that "the state acts unconstitutionally . . . if it uses religious means to serve secular ends where secular means would suffice." It is submitted that Justice Brennan's reference to religious means intended more than the mere use of religious words, such as "prayer,"

which words are incidental in nature and have no actual religious effect.

B. The statutes in both the case at bar and the Gaines case have a primary effect that neither enhance nor inhibit religion. The statutes in question do not mandate religious activity. They do not compose or select a prayer or other specific religious material. There is no indirect coercion to force the student to engage in religious thought. There is merely a period of enforced silence.

The statutes here involved do not result in (1) a student doing something that is forbidden by his conscientious beliefs, thus compromising his scruples, or (2) a student engaging in religious activities that although not contrary to his religious beliefs, he would not otherwise undertake, thus unfluencing his freedom of religious participation by choice.

In deciding constitutionality of the state statutes, there is a strong presumption of constitutionality. Any ambiguity in the statutes must be resolved in favor of their constitutionality. Roberts v. Clement, 252 F. Supp. 835, 845 (1966).

C. The statutes avoid excessive entanglement with religion. The statutes in this case do not involve entanglement of any kind with religion since they in no way support any religious institution and in no way result in any relationship between the government and any religious authority. Lemon v. Kurtzman, 403, U.S. 602 (1971)

The statutory provision for a moment of silence for meditation or prayer does not violate the "free exercise clause" or the First Amendment of the Constitution of the United States as applied to the states through the Fourteenth Amendment.

The intent of the statutes is that the moment of silence be used for serious thought. The statutes do not interfere with the right of parents to give their children a religious upbringing consistent with their beliefs. The parents are free to instruct their children on how they would like the children to use the moment of enforced silence. The children have a free choice of how to use the silence and will privately exercise that choice, guided by their parents. In Abington v. Schempp, 374 U.S. 22, Justice Clark speaking for the majority said:

> The Free Exercise Clause, likewise considered many times here, withdraws from legislative power, state and federal, the exertion of any restrain on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority. Hence it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates

against him in the practice of his religion. (ital. mine)

It is submitted that the moment of silence for meditation or prayer under the Alabama Statute and the Massachusetts Statute conducted in a matter calculated not to interfere with the school program or infringe upon the rights of others are not violative of the constitutional guarantees of the First and Fourteenth Amendments to the Constitution of the United States.

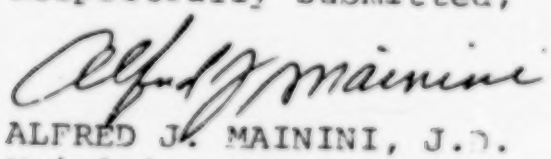
In the case at bar, the Court rested its judgment on a finding that the moment of silence statute lacks a secular legislative purpose and has the primary effect of advancing religion. The record does not recite the basis for the finding; and if that basis exists, it is the only distinguising feature between the case at bar and the Gaines case. Should there be some unusual circumstance in the case at

bar, justifying the decision of the Court, the Massachusetts statute should still stand as constitutional on its own merit and the Court should so find.

CONCLUSION

The Court should note probable jurisdiction and uphold the Massachusetts Statute as constitional under the Establishment and Free Exercise Clauses.

Respectfully submitted,



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May 23, 1984

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

LYNDA GAINES, ET AL,
Plaintiffs

v.

CIVIL ACTION
No. 76-435-M

WINSTON D. ANDERSON ET AL
Defendants

STATEMENTS OF UNDISPUTED FACTS

Now come the Plaintiffs and Defendants and stipulate to the following facts and documents attached hereto.

1. The Plaintiffs are students in the public schools of Framingham, Massachusetts.

2. The Defendants are the duly elected members of the School Committee of Framingham, Massachusetts and Dr. Albert L. Benson is the Superintendant of Schools of Framingham, Massachusetts.

3. On January 12, 1976, said Defendants (members of the School Committee) adopted the following motion: "Moved by Mr. Conlon, seconded by Mrs. Lavin, that the School Committee comply with the law, Chapter 71, Section 1A of the M.G.L. until such time as the courts rule the Chapter in violation of the Constitution." The parts of the official minutes of the proceedings of the School Committee dealing with this issue are attached hereto as Exhibit A.

4. On January 27, 1976, at a regularly scheduled meeting of said School Committee, further discussion on this issue and votes occurred all of which are reflected in the official minutes of the proceedings attached hereto as Exhibit B, (more particularly commencing on Page 6 thereof.)

5. Since February 2, 1976, the "Guideline For Implementation of Chapter 71, Section 1A of the Massachusetts General Laws," attached as Addendum A to Exhibit B, have been observed in all Framingham Public Schools by the agents of the Defendants.

6. Chapter 621 of the Massachusetts Acts of 1983 amended Chapter 71, Section

1A of the Massachusetts General Laws by adding the words "or prayer" after the word "meditation" in the fourth line thereof.

Respectfully Submitted

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